IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4640 OF 2006

Parle International (Division of Parle Agro Pvt. Ltd.) ... Petitioners

V/s.

Union of India & Ors. ... Respondents

Mr. Vikram Nankani with Mr. M.R. Baya for the petitioners.
Mr. M.I. Sethna with Mr. A.M. Sethna for the respondents.

CORAM : H.L. GOKHALE &
V.R. KINGAONKAR,JJ.
DATED : 27th July, 2006

P.C.

. Rule. The respondents waive service.

2. Heard Mr. Nankani in support of this petition. Mr. Sethna appears for the respondents.

3. The petitioners herein are manufacturers of water bottles which are supplied to the airlines. In the present case, it is the case of the petitioners that the Excise Duty is paid when the bottles go out of the factory. Over and above the duty which is paid on the maximum retail price, the department is insisting on Excise Duty to be paid on the basis of

the contractual price between the petitioners and the concerned airlines which obviously is a larger amount. That leads to a question as to whether the duty is to be charged under Section 4 or 4A of the Central Excise, Act, 1944.

4. Mr. Nankani, the learned Counsel for the petitioners points out that two Tribunals have taken a different view on this question. One being in the case of **Commissioner of Central Excise, Ghaziabad V/s. Explicit Trading & Marketing (P) Ltd.** reported in **2005 (191) E.L.T. 658** and another in the case of **Monsanto Manufacturers Pvt. Ltd. V/s. Commissioner of Central Excise, Ghaziabad,** reported in **2006 (193) E.L.T. 495.** The petitioner relied upon one of these orders. The decision of the Joint Commissioner was under challenge before the Commissioner (Appeal) who has rejected petitioner’s submission on the basis of a Government Circular. Mr. Nankani, submits that this was erroneous on the part of the Commissioner. He submits that the petitioner has a prima facie case and therefore, the pre-deposit should not be insisted.

5. Mr. Sethana, the learned Counsel appearing for the respondents, on the other hand, submits that

the Commissioner's order is a well reasoned order and this Court should not interfere at this stage. He points out that the Delhi High Court in the case of **Usha Udyog V/s. CEGAT** reported in **2003 (156) E.L.T. 201** held that for a hardship to become undue hardship, it must be shown that the burden was out of proportion. He also points out that S.L.P. against the Judgment has been dismissed by the Supreme Court.

6. The submission of Mr. Nankani is that independent of the question of hardship the aspect of prima-facie case ought to have been considered, in view of the two conflicting decisions of the Tribunal. In our view, the petitioners have an arguable case. In any case, Mr. Nankani is prepared to give a Bank Guarantee to cover the entire amount directed to be deposited i.e. Rs. 13 lacs which is 50% of the additional duty as also for Rs. 13 lacs which is the amount of penalty.

7. In our view, in the facts of the present case, the Bank Guarantee as offered by the petitioner will meet the ends of justice. The petitioners will give a Bank Guarantee of a nationalised bank to the tune of Rs. 26 lacs within three weeks, which will be kept

alive till the hearing of the appeal before the Commissioner and if required, the petitioners will further extend the period of Bank Guarantee.

8. In the circumstances, we set aside the order passed by the Commissioner dated 26th June, 2006 declining modification of the earlier order dated 18th May, 2006. That order will also stand set aside. The order of pre-deposit will stand substituted by this order providing for giving of the Bank Guarantee. The Commissioner will decide the appeal on merits after considering the submissions of the parties. As stated above, we make it clear that this order is passed considering the peculiar circumstances of the case, and that we are not expressing on the merits of the rival submissions.

9. Rule is made absolute as above. No costs are awarded.

[H.L. GOKHALE, J.]

[V.R. KINGAONKAR, J.]